No. 12,750

United States Court of Appeals

For the Ninth Circuit

LUCILLE MCGAH, E. W. MCGAH, CAROLE O'SHEA AND JOHN P. O'SHEA,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' CLOSING BRIEF.

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INTRODUCTION.

We have read and carefully reviewed Respondent's Brief together with his brief in the *Rollingwood* case, which he served with it.

It must be borne in mind that most of the facts in this case are either stipulated, or are in documentary form.

That the taxpayers were in the house rental business with their 95 houses is a *stipulated fact** (Tr. 150-151).

There are no conflicts in the evidence and the central point in the Tax Court's findings, is the finding, *based*

*Unless otherwise stated, all emphasis in this brief is ours.

entirely on an inference, that the taxpayers ABANDONED their *purpose* of holding the 95 rental units *primarily* for the purpose of rental-investment.

There is *no direct evidence whatsoever* in the record of any intention on the part of taxpayers to abandon this purpose.

This Court is not bound by any *inferences* which the Tax Court drew from the undisputed facts.

It has both the capacity and the authority to *draw its own inferences,* as we shall show in a subsequent portion of this brief.

Before proceeding to discuss the main issues presented, we desire to comment upon some minor points raised by Respondent's Brief:

IT IS ADMITTED THAT THE QUESTION WHETHER PROPERTY IS HELD PRIMARILY FOR SALE IS ESSENTIALLY ONE OF FACT.

We have no quarrel with this proposition, but we wish to point out here that the *crucial* finding of fact made by the Tax Court,—that the taxpayers *abandoned their purpose* to hold the houses primarily for rental-investment, *is based on an inference* drawn by the Tax Court from the facts, which are not in dispute.

As we have shown in our Opening Brief, that *inference* is *contrary both to the facts and to the law.*

At pages 9-10 of his Brief, Respondent, referring to this Court's decision in *Rubino v. Comm.,* 186 F. 2d 304, (which he says holds that the question whether property

is held by the taxpayer primarily for sale etc. is essentially one of fact) says:

> "That being so, we think it is pointless for taxpayers to reargue their case here, as upon a trial *de novo,* which is what they have done. * * *"

We propose to argue this case fully to present to this Court the background which will enable *this* Court to draw a *correct* inference from the facts and that *correct* inference is that petitioners *never* abandoned their purpose of holding the 95 houses primarily for rental-investment purposes.

THERE IS A VALID DIFFERENTIATION TO BE MADE BETWEEN TAXPAYERS' PURPOSE WITH RESPECT TO A GROUP OF 74 OF THE TOTAL OF 169 HOUSES BUILT, WHICH 74 HOUSES TAXPAYERS SOLD WITHOUT EVER HAVING RENTED THEM.

Respondent's Brief, p. 6, refers to this differentiation made by the taxpayers.

The differentiation is clearly established by the Findings of Fact themselves (Tr. 68—See *Appendix,* p. i).

What they did and *why* they did is now clearly shown by the findings (Tr. 69-70—*Appendix,* p. ii).

There *is* thus a *clear* and *sharp* differentiation of purpose with respect to the 74 units sold without ever having been rented and the 95 units which were rented at $50.00 per month. *This differentiation of purpose is shown by the Tax Court's findings.*

IT IS NOT TRUE THAT TAXPAYERS' OBLIGATIONS TO THE BANK ON LOANS WITH WHICH THE HOUSES WERE CONSTRUCTED COULD NOT HAVE BEEN DISCHARGED EXCEPT BY A SALE OF THE HOUSES.

This refers to page 7 of the Respondent's Brief and to the Tax Court's opinion (Tr. p. 75).

We have shown in our Opening Brief (page 55) that it is a *stipulated fact,* as shown in Exhibit 3 (Tr. 167) that the depreciation figure for the 35 houses on rental in each of 1948 and 1949 was identical—$7,041.34. Divide this by 35 gives $201.18 in TAX FREE DEPRECIATION DOLLARS *per annum per house,* which would have provided all the funds necessary to pay off each 100% $4,000 loan in 20 years,—the period it had to run.

Because the Tax Court could not understand this is no fault of the taxpayers.

One other fact that Respondent overlooks in this connection: The Transcript shows (pages 119-121 and 174-192) that the taxpayers *had other means* and *were engaged in many businesses.*

The statement that they lacked other income to pay off their obligations in San Leandro is simply not true.

THERE WAS NO EQUIVOCAL CONDUCT ON THE PART OF THE TAXPAYERS.

Respondent at page 14 of his Brief says that taxpayers' conduct was equivocal.

Again we refer the Court to our Opening Brief, pages 4-18 where the facts are accurately recorded and they show *no equivocal conduct.*

THE RECORD ABOUNDS WITH UNCONTRADICTED EVIDENCE (ORAL, STIPULATED AND DOCUMENTARY) OF THE FACT THAT TAXPAYERS' PURPOSE WAS TO HOLD THE 95 HOUSES PRIMARILY FOR RENTAL-INVESTMENT PURPOSES.

This refers to what is said at page 11 of the Respondent's Brief.

We call attention to the careful, correct and detailed statement of facts proven, shown at pages 4-18 of our Opening Brief which abounds with *uncontradicted evidence* of the taxpayers' rental-investment purpose *from the very inception of their enterprise.*

The withdrawal of a former associate *because* the deal *was* a rental deal, the application for and granting of *rental* priorities, the sale of 74 houses because a promised substitution of $50 per month *rental* units could not be made, the actual and bona fide *rental* of 95 units for over 17 consecutive months to 156 tenants before the first unit was sold, the *stipulation* that each house sold had been *rented* continuously from the date of completion until its sale, the fact that houses were *rented* when they could have been very profitably sold without effort, the fact that the *rental* operation has not yet ceased, proves conclusively that the taxpayers *did* have the purpose of holding the houses *primarily for rental investment* and sold houses, as they became vacant, *only* because of the pressure exerted on them by the bank.

This evidence can be *ignored,* but it cannot be *denied.*

THERE IS NO REASON FOR SUGGESTING THAT THE TESTIMONY OF THE TAXPAYERS WAS NOT TRUE.

Respondent's Brief, page 15, in a footnote, says that the Tax Court did not expressly say that it did not believe O'Shea's testimony to be true, but that it assumed only *arguendo* that the taxpayers' contentions were sound and supported by the evidence.

We should like to point out here that there was no reason for the Tax Court to disbelieve the taxpayers' testimony that the houses were acquired for rental purposes because that testimony was fully corroborated.

In *Julia Robertson,* 8 T.C.M. 870, where the taxpayer sold 4 rental units in 1944 and 15 units in 1945, the Tax Court referring to the houses built for the purposes of rental said (p. 872):

> "* * * Furthermore, petitioner's testimony that such was his purpose in acquiring the properties IS CORROBORATED BY THE USE TO WHICH THE PROPERTIES WERE DEVOTED IN THE TAXABLE YEARS. * * *"

In the case at bar, the *stipulated fact* is that the 95 units were *built* for rental and were *rented* continuously for 17 months from the time of completion to 156 tenants before a single sale was made (Tr. 148, 150, 151 and 167).

Thus the testimony of the taxpayers as to their *purpose* of building and holding the 95 houses for rental and investment is *fully corroborated.*

POINTS AND AUTHORITIES.

I.

THE WORD "PRIMARILY" AS USED IN SEC. 117 (j) I.R.C. MEANS "FIRST", "CHIEF" OR "PRINCIPAL" AND DOES NOT MEAN "FUNDAMENTAL", "ESSENTIAL" OR "ULTIMATE".

Respondent contends in his brief in the *Rollingwood* case (which was served on us) (p. 7):

> "that the word 'primarily' as used in the capital gains provision of the federal taxing statute, connotes 'fundamental' or 'essential' * * *"

whereas the taxpayers contend that the word "primarily" means *"first"*, or *"chief"*, or *"principal"*, which is what it *says*.

Respondent in his Rollingwood brief then refers to *Board of Governors v. Agnew,* 329 U.S. 441 where the Supreme Court held that the word "primarily" as used in the Bank Act of 1933 meant "essentially" or "fundamentally".

The reason for the Supreme Court's holding in that case is not difficult to understand when consideration is given to the facts and to the purpose of the statute.

In the *Agnew* case the Court was concerned with a statute providing that no employee of any corporation, etc. *"primarily* engaged in underwriting securities shall serve at the same time as director of any member bank of the Federal Reserve System, etc."

Finally, *(and this is very important)* the Court said there was *other intrinsic evidence in the Banking Act of*

1933 to support its conclusion. It referred to Section 20 outlawing affiliation of a member bank with an organization "engaged *principally*" in the underwriting business. And, the Court concluded at page 448:

> "* * * The inference seems reasonable to us that Congress by the words it chose marked a *distinction* which we should not obliterate by reading *'primarily'* to mean *'principally'.*"

There is no such reason for construing the word to be found in Sec. 117 (j).

See also *U. S. v. Bennett* (C.C. 5), 186 F. 2d 407 where the Court held that the word *"primarily"* as used in Sec. 117 (j) did *not* mean *"ultimately"* as the Collector contended. The Court there said:

> *"If the statute had been intended to mean what the collector contends for, the word 'primarily' would not have been in it.* Since 'primarily' *is* in the statute, it seems clear to us that to hold, as the collector contends, that the *main,* the *first,* purpose of the keeping of these breeder cattle was for sale, *does complete violence to the statute and to its purpose and intent.*"

It is respectfully submitted that the word *"primarily"* as used in Sec. 117 (j) means *"first", "chief"* or *"principal"* and not anything else.

II.

RESPONDENT, HAVING TWICE FAILED TO CONVINCE THE COURTS IN OTHER CIRCUITS OF HIS VIEWS RESPECTING SEC. 117 (j) NOW MAKES A THIRD ATTEMPT IN THIS COURT.

The Respondent's narrow and restrictive views of Sec. 117 (j), which he presents here, are not new.

His attempts to establish them in the 5th and 8th Circuits have been signal failures.

As shown at pages 36 and 37 of our Opening Brief he failed in the 8th Circuit in *Albright v. U.S.*, 173 F.2d 339 (C.C. 8).

In the 5th Circuit, Respondent was again unsuccessful. *U. S. v. Bennett* (C.C. 5), 186 F. 2d 407 which follows the principle of *Delsing v. U. S.* (C.C. 5) 186 F. 2d 59; *Emerson,* 12 T.C. 875, and *Fawn Lake Ranch Co.,* 12 T.C. 1139.

Now, Respondent having been unsuccessful in the 5th and 8th Circuits, is trying for a third time, in this Circuit, to convince this Court that the word "primarily" means *not* "primarily" but " 'fundamental', 'essential' and hence 'substantial' ".

III.

THE CRUCIAL FINDING OF THE TAX COURT, IN THIS CASE IS BASED ON AN INFERENCE, DRAWN BY THE COURT FROM UNDISPUTED FACTS AND THIS COURT HAS HELD THAT IT IS AS WELL EQUIPPED TO DRAW INFERENCES AS THE TAX COURT AND IS NOT BOUND TO ACCEPT THE TAX COURT'S INFERENCES AND THAT ITS DECISIONS CALL FOR NO MORE WEIGHT THAN THEIR LOGIC SUGGESTS.

The crux of the Tax Court's decision is a purported finding of fact:

> "Shortly before August 1, 1944, McGah and O'Shea decided that San Leandro should sell houses in order to obtain capital for further construction operations and they *abandoned the purpose* of holding the houses primarily for the production of rental income. * * *"

That finding rests upon an *inference* of abandonment drawn by the Tax Court. We have shown in our Opening Brief (pages 10 and 11) that the petitioner McGah and O'Shea had read to them paragraph 12 of the Stipulation of Facts (Tr. p. 153) and each was asked what the partnership *did* with reference to the advice given by the Bank.

Each testified to substantially the same thing—*they sold some of the houses as they became vacant.*

There is no evidence in the record of any expression of *intention* on their part with respect to their *purposes* thereafter with respect to any abandonment of their house rental-investment business.

That they were in the house rental business with the 95 houses is a stipulated fact. (Tr. pp. 150-151—*Appendix,* p. iii).

The Tax Court (Tr. p. 66) in its FINDINGS OF FACT states:

> "The facts which have been stipulated are found as facts and are incorporated here by this reference."

There was no attempt made by Respondent's Counsel, on cross-examination of either of Petitioners to show any change in purpose on their part to hold the houses primarily for rental-investment.

This is not a case where the Tax Court's findings adverse to taxpayers rests on any direct evidence.

That this is true is clearly shown by the Tax Court's Opinion. Thus (Tr. 80) the Tax Court said:

> "We think that the *reasonable conclusion to be drawn from the evidence* is that San Leandro was in the *business* of selling houses in 1944. * * *"

This is purely an *inference.*

Again (Tr. 77) the Tax Court says:

> "*Upon all of the evidence* it must be *concluded* that at some time prior to August 1, 1944, the members of the partnership—San Leandro Homes Co.—*changed their alleged original purpose* with respect to the 95 houses held by the partnership *from the purpose of holding them primarily for rent, for investment purposes,* to holding them primarily for sale and selling them as they became vacant. * * *"

This again is an *inference.*

(We have shown in our Opening Brief, pp. 21-30, that the finding of abandonment is contrary both to law and

fact and that an inference of abandonment cannot be drawn *unless the facts proved reasonably beget the EXCLUSIVE inference of abandonment.*)

The law is well established that this Court may draw its own inference from the facts proven and is not bound by the Tax Court's inference and findings. *Kuhn v. Princess Lida of Thurn & Taxis* (C.C. 3, 119 F. 2d 704, 705.

This Court has affirmed the principle of the *Kuhn* case, supra, in two recent decisions:

In *Pacific Portland Cement Company v. Food Machinery and Chemical Corporation* (CC 9, re-hearing denied January 6, 1950, 178 Fed. 2d 541, 548) an action for declaratory relief and for money paid to the defendant under protest, the Court said:

> "* * * The Supreme Court has told us that, 'A finding is "clearly erroneous" when although there is evidence to support it, *the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co.,* 1948, 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746.
>
> "As a corollary to this rule, *we may make our own inferences from undisputed facts or purely documentary evidence.* For, to use the colorful language of the Court of Appeals for the Third Circuit, *the rule does not operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.' Kuhn v. Princess Lida of*

Thurn & Taxis, 3 Cir., 1941, 119 F. 2d 704, 705. And see *Western Union Tel. Co. v. Bromberg,* 9 Cir., 1944, 143 F. 2d 288, 290; *Home Indemnity Co. v. Standard Accident Ins. Co.,* 9 Cir., 1948, 167 F. 2d 919, 922, 923."

This Court, in a very recent case, decided November 17, 1950, *Gailbreath v. Homestead Fire Ins. Co.,* (CC 9) 185 F. 2d 361, 364, states this rule.

This Court again reaffirmed the rule of the *Kuhn* case, supra, in *Gillette's Estate, et al. v. Commissioner* (CC 9) 182 F. 2d 1010, 1013, 1014. The case was submitted on stipulated facts and oral evidence put on solely by petitioner. The Court said (p. 1013):

"* * * The error complained of was asserted to exist *in inferences or conclusions drawn by the* Tax Court therefrom. In such circumstances it has been said in cases appealed from District Courts that within certain limits we are free, that is, that we have the *power* (and we would suppose the *duty*) to draw such inferences and conclusions as we deem proper. * * *

"It is commonly stated, and properly so, that due respect should be given to the Tax Court's expertness in tax matters. *While in most circumstances such respect would weigh heavily, we are not impressed by it here where the ultimate inference of fact must be as to what the decedent contemplated as the driving reason for his actions regarding his property.* In this duty, which does not bring technical tax questions into play, it is in no way derogatory to the Tax Court to say that *United States Courts of Appeals are as*

> *well equipped to draw inferences as is the Tax Court and for that reason the Tax Court decisions call* for little more weight than its logic suggests."

The same rule has been enunciated in various of the other Circuits, as for example: *Stubbs v. Fulton Nat. Bank,* (CC 5) 146 F. 2d 558; *U. S. v. So. Georgia Ry. Co.* (CC 5) 107 F. 2d 3; *Murray v. Noblesville Milling Co.* (CC 7) 131 F. 2d 470; *McManus Est. v. Comm.* (CC 6) 172 F. 2d 697.

This Court thus has full power and authority to consider the correctness or error that resides in the *Tax* Court's *inference* on the basis of which it predicates its finding of an abandonment of the *primary* rental and investment purpose.

In its opinion, the Tax Court shows clearly that the *purpose* to hold the 95 houses for rental-investment *clearly existed.* Thus (Tr. 78) it says:

> "* * * The question becomes concerned with whether *an original purpose of* holding property *changed,* and if so, when."

Surely, a non-existent purpose could not have changed.

In its *opinion* (Tr. p. 81) the Tax Court says:

> "In the instant proceeding, we are unable to conclude that the petitioners have proved that San Leandro was holding 95 houses in 1944, prior to the sale of the 14 houses, primarily for investment purposes. * * *"

In this connection we ask this Court to look again at the SUMMARY OF THE CRITICAL FACTS set forth in our Opening Brief pp. 15-18—based primarily on stipulated facts and documents and ask, as we have asked before: HOW COULD THE TAXPAYERS (as found by the Tax Court) HAVE *ABANDONED* THEIR PURPOSE OF HOLDING THE 95 HOUSES PRIMARILY FOR RENTAL-INVESTMENT IF THEY NEVER *HAD* THE PURPOSE TO BEGIN WITH?

Respondent in his Brief (p. 16) being hard put to sustain this purported finding of an abandonment, evolves an idea, which, to say the least, is *unique,* in connection with an abandonment. *We refer to the concept of a "partial"* (?) abandonment.

Respondent says that the Tax Court did not "find or hold that they had ENTIRELY abandoned their *rental business.*"

We have never claimed that the Tax Court found that Petitioners ever abandoned their *"rental business"*. THE EXISTENCE OF THAT BUSINESS IS A STIPULATED FACT (Tr. p. 150, par. (f) and EXHIBIT 3 attached to the Stipulation (Tr. 173).) Such a finding would have been contrary to the stipulated fact.

But the Tax Court *did* find, as we pointed out, that the taxpayers ABANDONED THEIR PURPOSE of holding the houses primarily to produce rental income.

We have pointed out in our Opening Brief, page 24, that THERE IS NO SUCH THING AS A CONDI-

TIONAL OR PARTIAL ABANDONMENT. An abandonment *"must be all in all or not at all"*. (*Trevaskis v. Peard,* 111 Cal. 599, 605)

The inference of alleged *abandonment of purpose* cannot be drawn because the facts do not reasonably beget the EXCLUSIVE inference of abandonment. (1 *C.J.S.* p. 15, Sec. 7c; *Foulke v. N.Y. Consol. R. Co.,* 228 N.Y. 269, 127 N.E. 237, 238; *Columbus & G. Ry. Co. v. Dunn,* 185 So. 583, 586.

IV.

A LONG LIST OF TAX COURT DECISIONS HOLDS THAT THE NUMBER AND FREQUENCY OF SALES OF ITEMS OF PROPERTY USED IN THE TAXPAYER'S RENTAL BUSINESS DOES NOT PUT HIM IN THE SELLING BUSINESS SO AS TO DEPRIVE HIM OF THE BENEFITS OF SEC. 117 (j).

At pages 39 to 51 of our Opening Brief we have cited and quoted from a series of recent Tax Court decisions which clearly establish the proposition that the number and frequency of sales of property used in taxpayer's rental business does not cause that property to become property held primarily for sale to customers in the ordinary course of business.

To point out distinctions without differences in these cases, as Respondent attempts to do, is sheer futility.

We again refer the Court to these cases and their clear disposition of the problem under Sec. 117 (j).

We are well aware of the cases in this Circuit, cited by Respondent, and holding that the number and frequency of sales put the seller into the business of selling so that his property *did not qualify as a capital asset* and hence did not qualify for capital gains.

But, when the owner sells property used in his trade or business of *renting* the property, which he has held primarily for rental-investment purposes and not primarily for sale to customers,—the cases hold with singular unanimity that his sales do not disqualify him from the relief provided by Sec. 117 (j).

His *rented* property was not a capital asset to begin with *(I.R.C.* Sec. 117 (1) (B)) and does not become such by the number and frequency of sales thereof.

The Congress has not said that the relief intended by Sec. 117 (j) is to be denied if some unstated number of sales of property used in trade or business and held primarily for rental and investment is sold.

CONCLUSION.

In this case the crucial finding of the Tax Court is a finding *based on an inference* (from evidence which is not in dispute) that the taxpayers *abandoned* their purpose of holding the 95 houses *primarily* for rental and investment.

Section 117(j) of the Internal Revenue Code is a *relief measure.* The Respondent has been twice unsuc-

cessful in other Circuits in his effort to narrow and restrict its meaning so as to deny *relief* where relief was due.

Having been unsuccessful in the 8th and 5th Circuits to convince the Court that it should deny relief on the basis of his views with respect to an alleged narrow and and restricted meaning to be given to Section 117 (j), he now makes his third attempt in this Court.

We respectfully submit, since this Court is entitled to draw its own inference from the undisputed facts, that a mistake has been committed by the Tax Court in its conclusion which it says it drew from the entire evidence, in its *conclusion* or *inference* that the taxpayers *intended* to and *did* abandon their primary purpose of holding the property for rental and investment.

The record contains the direct testimony of the taxpayers that they intended a rental venture with all of the houses from the very beginning; that they sold the block of 74 houses comprising a contiguous unit which included the 69 $39.99 monthly rental units *only* when they found out that the promised substitution of $50.00 rental priorities were not obtainable, inasmuch as they knew that these houses, all of which were built at the same cost per unit, could not be profitably rented at $39.99 a month. Their testimony as to their intent to rent the 95 houses if *fully corroborated* by the fact of rental for the period of 17 months prior to the time that a single house was sold.

It is respectfully submitted that this Court should draw its *own* inference from the undisputed facts that there was *no* abandonment of taxapyers' purpose to hold the 95 units for rental-investment and that the Tax Court's finding and decision is clearly erroneous.

Dated, Oakland, California,
April 18, 1951.

M. W. Dobrzensky,
Edward B. Kelly,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix.

Appendix

The Tax Court found (Tr. 68):

> "Originally, in August of 1942, McGah and O'Shea contemplated renting all of the houses, provided all could be rented at the rate of $50 per month rent. They applied to O.P.M. (Office of Production Management) for allocation of housing units to be built under preference ratings on materials which could be rented for $50 per month, but they were told by the officials in charge that some of the houses would have to be made available at a monthly rental of $39.99, and they agreed, therefore, that 69 units *would be made available* at that rental, and 100 units would be made available at a monthly rental of $50; and the approval of the application for preference ratings was given upon that understanding; and it was set forth in the application. *However, there was an oral understanding with officials that this allocation might be changed if and when other directives and allowances were made officially, so that McGah and O'Shea had some hope that eventually, all of the 169 units could be rented for $50 per month.*"

Next the Tax Court *found* that the taxpayers *knew that they could not rent houses profitably for $39.99 per month* (Tr. 69):

> "* * * They knew, also, in the beginning, that the carrying or financial charges for the interest and mortgage payments would amount to about $33 per month for each house; that maintenance charges and other expenses would amount to around six or seven dollars per month for each house; *and that, consequently, it would not be profitable to rent houses for $39.99 per month. They considered that the monthly rental would have to be $50 per month if San Leandro were to profitably hold the houses for rental.*"

What they did and *why* they did is now clearly shown by the findings (Tr. 69-70):

> "As the houses were nearing completion, McGah *called upon officials in F.H.A. to request their approval of charging more than $39.99 for the 69 houses which it had been specified should be made available at that rental, but the request was denied.* At that time McGah learned that San Leandro was not restricted in any respect in the matter of its electing to sell the houses rather than to rent them; that San Leandro was privileged to sell any of the houses it desired, and could sell all of them.
>
> *"There was an active market for houses, and there would have been no problem in selling them.*
>
> *"When McGah and O'Shea learned at the end of 1942, or in the beginning of 1943, that they could not get more than $39.99 rental for 69 of the houses, they decided then to sell a group of 74 houses which, by location, made a group.* San Leandro sold 74 houses during its first fiscal year which ended October 31, 1943, without ever letting them be rented, including the 69 which could have been rented for only $39.99 per month. The net profit from these sales was $82,-691.20. The 'realized profit' upon an installment sales method of reporting the gain was $53,820.13, and that amount was reported as ordinary income for the fiscal year ending in 1943.
>
> "San Leandro, *from and after March 15, 1943, rented the remaining 95 houses,* but did not take leases on any of them. Rather, *they were rented on oral month-to-month tenancies to defense workers for $50 rental per month. San Leandro maintained a rental office and paid an agent $10 for each house rented. From March 15, 1943, until August 14, 1944, the 95 houses were occupied by 156 different tenants."*

That they were in the house rental business with the 95 houses is a stipulated fact (Tr. pp. 150-151):

"(e) The remainder of said 169 houses, viz., 95 houses were rented by said partnership from and after on or about April 1, 1943, to persons engaged in National Defense activities. *From March 15, 1943, until August 14, 1944, said 95 houses were rented to 156 different tenants.*

"(f) The rental of said 95 houses was carried on by the partnership from an office of said partnership maintained for that purpose located at No. 1411 Davis Street, San Leandro, California. The houses were let on oral month-to-month tenancies at $50.00 per month. A commission of $10.00 per house was paid to an agent for renting. The rental operations were conducted by a lady employed for that purpose at the partnership's aforesaid office. She looked after all rental matters, including any complaints, collections and the like. Annexed hereto, made a part hereof, all with the same force and effect as if set out at length herein, and marked Exhibit '3,' is a statement of the receipts and disbursements of said partnership from said rental operation as shown by the partnership books, for the fiscal years of the partnership commencing October 31, 1944, and ending on the 31st day of October, 1949. * * *"

* * * * * *

"(h) Each of the 95 houses, sold as aforesaid, until it was sold, *had been rented continuously by the partnership from on or about the time the construction of said house was completed.*

"(i) Each of said 95 rented dwelling houses sold by said partnership, subsequent to April 1, 1943, was owned and held by said partnership for at least six (6) months prior to the sale thereof and *prior to such sale and during the six months' period had been rented continuously by the partnership, as aforesaid.*"